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SUPR. COURT, U. S.
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APR 26 1913
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No. 678.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS ET AL., APPELLANTS,

v.

J. E. PARRISH, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1913

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case presents the single question whether interest is recoverable in a contract action against a Federal corporation created by Congress for the sole purpose of administering a governmental charity and conducted under the direct supervision of the United States Government.

The appellant corporation was created by act of March 3, 1865 (13 Stat., 509), as amended by act of March 21, 1866 (14 Stat., 10), as "an establishment for the care and relief of the disabled volunteers of the United States Army," with power to sue and be

sued, and to acquire sites for military asylums and erect the necessary buildings. (See secs. 4825 to 4837, inclusive, of the Revised Statutes.)

On November 19, 1901, and March 8, 1902, the Home entered into contracts with appellee for the construction of certain buildings in Washington County, Tenn. (R., 3, 64.) The contract provided that in case the contractor failed, in the judgment of the architect in charge, to prosecute the work diligently and faithfully according to specifications, the Home might annul the contract by notice in writing and complete the work by open purchase or contract. (R., 65.)

The dates originally set for completion of the work under the contracts were, respectively, November 18, 1902, and January 7, 1903. (R., 4, 65.) Extensions were granted, however, the final extension being until August 15, 1903. (R., 5.) Upon that date, appellee not having complied with his contract, the required notice of annulment was given. (R., 5, 12.) Appellee, however, refused to quit the premises or withdraw his workmen (R., 5); and appellants thereupon filed a bill in the Circuit Court, praying for an injunction to compel his removal, and for an accounting. (R., 2, 7.) An answer and cross bill were filed by appellee, denying that the facts justified the order of annulment and seeking a recovery of the contract price, with damages. (R., 8, 20, 56.)

The Circuit Court held that the Home was justified in annulling the contract on account of substantial delays and defects in its performance; but that

appellee was entitled to recover the original contract price (as modified by the cost of certain extras, omissions, and modifications) less the payments actually made to appellee and the reasonable cost to appellant of completing the buildings. (R., 69.) The final decree, filed October 8, 1910, awarded recovery in the principal sum of $21,242.06, with interest thereon from February 15, 1904, the date of completion of the buildings, amounting to $8,496.82; in all, $29,738.88. (R., 72–77.) This decree was amended on January 6, 1911, by a deduction of $102.94, leaving $29,635.94 as the amount of appellee's recovery. (R., 77–79.) The principal has been paid, and this appeal involves only the interest.

Appellants assigned error to the allowance of interest, and by direction of the Attorney General took the case to the Circuit Court of Appeals, where judgment was affirmed. (R., 79, 86.) Thereupon appellants, with the authority of the Department of Justice, prosecuted the present appeal under secs. 128 and 241 of the Judicial Code. (R., 90–94.)

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in holding that appellant was liable for interest.

BRIEF OF ARGUMENT.

I. The National Home, as a governmental agency, is subject to the rule that interest can not be recovered against the Government without its express consent.

(*a*) The Home a governmental agency.

(*b*) The general rule.

(*c*) Its application to the case at bar.

(1) In reason;

(2) Under the authorities;

(3) By analogy.

II. The power to sue and be sued, conferred on the Home by its charter, does not render it liable to the payment of interest.

(*a*) Restricted scope of this charter power in the case of public charitable corporations.

(*b*) Distinction between capacity to be sued and liability in a suit.

(*c*) This power does not amount to an express authorization by Congress of the recovery of interest.

ARGUMENT.

I. The National Home, as a governmental agency, is subject to the rule that interest can not be recovered against the Government without its express consent.

(*a*) *The Home a governmental agency.*

The Home is under the direction of twelve managers. Three of these are the President, the Secretary of War, and the Chief Justice; the others are elected by Congress. (R. S., §§ 4825–4827.) Estimates for its support are included in the estimates for the War Department; it is wholly dependent upon Congress for its maintenance. (18 Stat., 343, 359; 24 Stat., 222, 251.) Its inmates are subject to the rules and articles of war as though they were in the Army. (R. S., § 4835.)

This court has defined the status of this institution. In *Ohio* v. *Thomas* (173 U. S., 276), the governor of the Central Branch of the Home, situated in Ohio, was convicted by a court of that State of furnishing oleomargarine to its inmates in violation of a State statute, and sued out a writ of *habeas corpus*. It was held that since the Home was a Federal institution, created by and under the sole and exclusive jurisdiction of Congress, its governor, as a Federal officer, was not amenable to State law for an act done by virtue of congressional authority.

To the same effect are *Overholser* v. *National Home for Disabled Soldiers* (68 Oh. St., 236), and *Lyle* v. *National Home for Disabled Volunteer Soldiers* (C. C. Tenn.) (170 Fed., 842), both of which hold that the Home, in spite of its capacity to be sued, is not liable in damages for a tortious use of its land to the injury of adjoining property. The Home, declared the Ohio court, is a public corporation discharging only governmental functions, and a suit against it is virtually a suit against the Government and its property. (68 Oh. St., 248, 250.)

This fact seems obvious without the citation of authority. A corporation without shares or stockholders, organized not for profit but solely to discharge the Government's debt of gratitude toward those disabled in its service and defense, and under the direct control of the administrative and legislative branches, is nothing more than an arm of that Government, and incapable of acting in other than a governmental capacity.

Any exemption from liability, therefore, which exists in favor of the Government should equally apply to this corporation in the absence of expressed provision by Congress to the contrary.

(*b*) *The general rule.*

The liability of the Government, whether State or Federal, to pay interest on claims against it, is well defined. Interest is never recoverable unless the sovereign has expressly assumed the obligation therefor, either by legislative permission or authorized contract stipulation.

> *United States* v. *Sherman*, 98 U. S., 565.
> *Tillson* v. *United States*, 100 U. S., 43.
> *Harvey* v. *United States*, 113 U. S., 243, 249.
> *Angarica* v. *Bayard*, 127 U. S., 251.
> *United States* v. *North Carolina*, 136 U. S., 211.

This principle is embodied in § 1091 of the Revised Statutes so far as suits in the Court of Claims are concerned. (*Tillson* v. *United States*, *supra*.) The rule existed at common law, however, and applies to the Federal Government in the absence of statutory enactment. (*United States* v. *Sherman*, *supra*; *Angarica* v. *Bayard*, *supra*.)

The requirement that the assent of Congress to such liability must be *express*, has been strictly adhered to. A special statute authorizing recovery against the United States in a certain case or class of cases does not justify the court in awarding interest

upon the claim unless Congress has declared that to be its intention in explicit terms.

Tillson v. *United States, supra.*

Harvey v. *United States, supra.*

United States v. *Barber* (C. C. A. 5th C.), 74 Fed., 483.

Watts v. *United States* (D. C. N. Y.), 129 Fed., 222.

Pennell v. *United States* (D. C. Me.), 162 Fed., 75.

(*c*) *Its applicability to the case at bar.*

(1) The principle upon which the rule rests is commonly stated to be that "delay or default can not be attributed to the Government. It is presumed to be always ready to pay what it owes." (*United States* v. *Sherman, supra,* 567, 568; *United States* v. *South Carolina, supra,* 217.) This must mean that where such delay has occurred through the act or laches of an officer, the State can not, on grounds of public policy, be made to bear the burden of such official neglect without its consent. Again, the rule may be explained upon the broad doctrine of the sovereign's immunity from liability not expressly submitted to.

Upon either assumption, however, the reason of the rule applies as strongly to a governmental agency like the appellant as to the Government itself. The delay or default of the Home, if any there be, is the delay or default of the Government acting (as a Government can only act) through its agents—in this instance the officers of the Home. (*Ohio* v. *Thomas, supra.*) Any liability incurred by the Home is the

liability of the Government, and must be met by appropriation of public funds like any other public debt. To say that neglect can be imputed to the Home, although not to the Government; or that public policy protects the taxpayers from official carelessness under a Government contract, but not under a contract made in terms with a governmental agency, is to disregard substance and embrace form.

Again the immunity of the sovereign, to be more than nominal, must extend to its agencies, whatever their nature or shape; to an arm of government clothed with the corporate entity as to a department thereof, or its head in his official capacity. An officer who makes an authorized contract for his Government incurs no personal liability thereon. (*Hodgson* v. *Dexter*, 1 Cranch, 345; *District of Columbia* v. *Camden Iron Works*, 181 U. S., 453, 460.) A claimant can not, by bringing mandamus against the Secretary of State, or of the Treasury, compel that officer to pay over interest from public funds in his custody, unless the United States would be liable for that interest in a direct action. (*United States* v. *Sherman*, *supra; Angarica* v. *Bayard*, *supra.*) It should be equally impossible to compel this corporation—acting as a mere conduit of Federal authority—to respond in damages which could not, in the absence of that conduit, be recovered from the Government itself.

(2) While there are no cases squarely in point, the trend of the authorities favors the view here advanced.

Certain cases cited below by appellee may be readily disposed of.

Erskine v. *Van Arsdale* (15 Wall., 75) was an action against a collector of internal revenue, to recover back taxes illegally exacted by him and paid under protest. A judgment awarding interest from the date of the illegal exaction was sustained by this court.

This decision was followed in *Redfield* v. *Ystalyfera Iron Co.* (110 U. S., 174) and *Redfield* v. *Bartels* (139 U. S., 694).

The liability enforced in these cases was primarily a personal one. At common law, a revenue officer was individually liable for moneys collected illegally and paid under protest, even though he acted in good faith and under instructions from his superior. (*Elliott* v. *Swartout*, 10 Pet., 137, 156.) In the United States, the Federal Government has stepped in and taken over this liability by statute, thus relieving the collector. (*Arnson* v. *Murphy*, 109 U. S., 238, 243; *Treat* v. *Farmers' Loan and Trust Co.*, 185 Fed., 760.) It is but natural, however, that those statutes should not be held to have altered the nature or extent of the obligation. Since the revenue officer was obliged to pay interest as an individual, it follows that the Government, standing in his shoes, becomes subject to the same measure of damages. The difference between this and the case at bar is obvious. One is the assumption of an existing personal liability; the other the extension of the governmental liability to a new entity, the corporation appellant.

A well-recognized distinction exists between an officer's personal liability of an officer for tortious or unlawful acts done under the alleged authority of the State, and his responsibility as a representative of his Government, and upon that distinction often depend the nature and extent of the remedy against him and the court's jurisdiction of the suit. (See *Stanley* v. *Schwalby*, 147 U. S., 508, 512, 518.) And a like distinction between personal and representative *rights* determines the availability against the officer of defenses to which the State is not subject. (*Wasteney* v. *Schott*, 58 Oh. St., 410.) The underlying principle of course is that the court will look behind the parties of record to determine the real parties in interest and that respective rights and liabilities will be governed accordingly.

New Hampshire v. *Louisiana*, 108. U. S., 76.
United States v. *Beebe*, 127 U. S., 338.
Belknap v. *Schild*, 161 U. S., 10.

In this connection, the cases dealing with the court's jurisdiction of a suit against the officers of a State, under the 11th amendment to the Constitution, may prove enlightening.

In re Ayers, 123 U. S., 443, decided that a Federal court could not entertain jurisdiction of a suit to restrain the attorney general of a State from enforcing a State statute alleged to impair the obligation of complainants' contract with the State. For, said this court, since the only matter complained of was the violation by the State of its contract and the threatened act of its attorney general in furtherance

thereof, the latter was obviously sued in his representative capacity merely; hence the State was the real party in interest. A different situation is presented when an officer is sued for a tort committed under color of a void statute. He has then perpetrated in his own person a legal wrong and his alleged authority for his act is a nullity. But a *contract* can not be violated save by a party or an agent acting as such; and so the action was predicated on the official character of the act complained of and the actor. (123 U. S., 486–492, 498, 506.)

This decision was affirmed in *McGahey* v. *Virginia* (135 U. S., 662, 684).

Mutatis mutandis, the doctrine of the Ayers case applies here. The present suit is for the enforcement of a contract which is virtually with the Government, although nominally with the corporation. That body, however, unlike an individual officer, has no dual capacity to confuse the issue. It is an arm of Government—nothing more; and to talk of it as acting in a personal capacity is absurd. Both in making the contract and its conduct thereunder it acted merely as a representative of the Government. Its liability should therefore be that of the Government, neither more nor less; for clearly, the United States is the real party in interest.

(3) *By analogy:*

> In several respects the rights and liabilities of corporations like the appellant have been assimilated by those of the States they represent.

Thus, a public charitable corporation, whether or not authorized to sue and be sued, is not liable in *tort* for personal injuries resulting from the malice or negligence of its employees.

Maia v. *Eastern State Hospital*, 97 Va., 507.

Williamson v. *Louisville Industrial School*, 95 Ky., 251.

Moody v. *State Prison*, 128 N. C., 12.

Nor is it subject to *mechanics' lien* laws unless expressly mentioned therein.

Thomas v. *Industrial Union*, 71 Ill., 310.

Patterson & Co. v. *Pa. Reform School*, 92 Pa. St., 229.

Phillips v. *Univ. of Va.*, 97 Va., 472.

Nor does the *statute of limitations* run against such an institution.

Eastern State Hospital v. *Graves*, 105 Va., 151.

Cox v. *Board of Trustees of Univ. of Ala.*, 161 Ala., 639.

These cases, and the reasoning on which they stand are persuasive in the present controversy. If a mechanic's lien can not be filed against a public institution, it is difficult to see why interest should be allowed against it. Both are ordinary incidents to a recovery for breach of contract.

It is also noteworthy that an early American case deduced the rule that interest was not recoverable against the State from the similar rule as to the statute of limitations, placing both "upon the

ground that the State is never presumed in default or derelict of duty." (*State* v. *Thompson*, 10 Ark., 65.)

Unless, therefore, the recovery of interest against the appellant corporation was expressly authorized by Congress, such recovery was improperly allowed by the court below.

II. The power to sue and be sued, conferred on the home by its charter, does not render it liable to the payment of interest.

It must be borne in mind that unless this clause in the charter amounts to express consent by Congress to the payment of interest, it is insufficient to take the case out of the general principle heretofore discussed. The sole question is, therefore, whether the clause meets this requirement.

(*a*) *Restricted scope of this charter power in the case of public charitable corporations.*

We have seen that this clause in its charter does not render such a corporation generally liable in tort, nor subject to mechanics' lien laws. The courts are loath to take away by implication the privileges and immunities of the sovereign which normally adhere to these public functionaries. Thus the rule as to torts has been explained on the ground that its powers were granted to the public body to be exercised exclusively for governmental purposes, which of course did not include the commission of a tort nor the payment of damages therefor.

(*Maia* v. *Eastern State Hospital*, *supra*.)

(*b*) *Distinction between capacity to be sued and liability in a suit.*

It is submitted that an adherence to this distinction explains the cases above adverted to and furnishes a clear and reasonable interpretation of the clause in the charter.

The corporation derives none of its substantive liability from the provision that it may be sued. That merely serves to remove the immunity from suit which would otherwise attach to it as a governmental agency. The liability it can incur when such immunity is removed depends upon rules of substantive law and the other provisions of its charter. There is nothing in those provisions which authorizes a recovery of interest. The suggestion made below that the power to contract for the erection of buildings, coupled with the capacity to be sued, amounts to such an authorization, is without force. It ignores the principle heretofore established—that *express* consent is necessary to subject a governmental agency to liability for interest. The power to contract and the capacity to be sued are both possessed by the Federal Government itself; they do not render it liable for interest on its contracts.

(*c*) *This power, therefore, does not amount to an express authorization by Congress of the recovery of interest.*

This follows of necessity from the foregoing discussion. But a bare inspection of the clause in question leads to the same result. A permission

to sue and be sued does not, in the fair meaning of the words, express as the clear intention of Congress that its creature shall be liable for interest. An express assent is not to be inferred by a process of elaborate implication.

It follows that the charter of appellant corporation did not affect its liability to pay interest.

CONCLUSION.

The judgment of the Circuit Court of Appeals was erroneous, and should be reversed.

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